Supreme Court, U.S.
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No.

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT M. BEATTIE JR.,

Petitioner,

v.

THE BOEING COMPANY,
A Delaware Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a *Bivens* action, should Executive Branch security clearance decisions by a private party should be treated the same as those of a government agency?

2. Whether this Court's holding in *Egan*--that the Merit Systems Protection Board may not review Executive Branch security clearance decisions--"extends to review by the courts," as the court of appeals held?

3. Whether denial of a security clearance can be grounds for a *Bivens* action?

4. Whether a private party, acting as a federal agent under color of authority when making Executive Branch security clearance decisions over other private parties, may be sued in a *Bivens* action?, and, if so, when the private party is a corporation, is the corporation a person for *Bivens* action purposes?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 43 F.3d 559 (1994). The prior district court Memorandum and Order is unpublished. Two related opinions from a prior suit based on the same facts are Beattie v. United States, 759 F.Supp. 753 (D.Kan.1991), *vacated as moot,* Beattie v. United States, 949 F.2d 1092 (10th Cir. 1992). All are found in the appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, ...--to controversies to which the United States shall be a party--...."

United States Constitution, Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ... , or the right of the people ... to petition the government for a redress of grievances."

STATEMENT OF THE CASE[1]

Petitioner *pro se* Beattie[2] cause arises directly under the Constitution and is heavily fact dependent. Beattie, a civilian, was employed by Boeing in 1984 to work in its Dept. of Security & Fire

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1. Jurisdiction in the court of first instance was based on 28 U.S.C. § 1331.

2. Beattie has been an attorney only 17 months. His counsel of record was terminated and has withdrawn.

Protection (S&FP), granted a SECRET level security clearance by the Director Industrial Security Clearance Review (DISCR), and began working on classified Air Force (AF) projects at Boeing.

In 1987, Beattie began working on, and had access to classified information concerning, the two 747's Boeing had contracted with the AF to build to serve the Commander-in-Chief as the next Air Force One (AF-1). *see*,[3] Beattie v. Boeing, 43 F.3d 559, 560, Footnote 3. (A4-5). Beattie v. U.S., 759 F.Supp. 753, 755-56 (D.Kan.1991)(finding of uncontroverted fact # 3)(A88-89). N.J. Addleman, Boeing's manager of information security report to DIS and AF, March 24,

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3. "App." refers to Beattie's appendix sent to Tenth Circuit in *Beattie v. **Boeing***. "P.App." refers to Beattie's appendix sent to Tenth Circuit in the prior case of *Beattie v. **United States***. "(Axxx)" refers to the appendix of this petition for certiorari.

1989. App. at 317.

Beattie filed a grievance with his union, United Plant Guard Workers of America (UPGWA) shortly after February 11, 1989, when civilian Boeing security administrator, James Barton, revoked Beattie's Air Force One (AF-1) security clearance in response to Beattie's "off duty political activities, including anti-nuclear activities."[4] *see* Beattie v. Boeing 43 F.3d 559, 561 (1994)(A6-9). Statement of U.S.A.F. Captain Barry S.

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4. Beattie was president of Firefighters for Social Responsibility (FSR), a nonprofit organization modeled after Physicians for Social Responsibility (PSR), the American affiliate of International Physicians for Prevention of Nuclear War, the 1985 NOBEL PEACE PRIZE recipient. Victor Sidel, M.D., a PSR founder who represented PSR in receiving the PEACE PRIZE in Oslo, Norway, was on FSR's Board and gave deposition testimony that Beattie is known nationally by leaders in the peace movement. App. at 308. However, the only visible political activity temporally proximate to his security clearance revocation was Beattie's having just been team captain of the Democrats in the local Democrat v. Republican publicity flag football game. The Democrats won.

Graham, 27 Sept. 1989 ("Beattie was not selected by Boeing [for a AF-1 security clearance] because of his antinuclear activities."). P.App. at 154. *re: grievance see* Beattie v. U.S., 759 F.Supp. at 756 (finding of uncontroverted fact #5), App. at 254-262 (grievance).

Prior to Boeing's decision, groundless rumors, source unknown, were spread that Beattie was a traitor to the United States who would soon have his security clearance revoked, then be arrested, and that he had a tattoo of a hammer and sickle on his body identifying him as a deep cover Soviet spy.[5]

At a tension-filled squadroom meeting Beattie refuted the rumors and explained that his security clearance had been

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5. Beattie has a burn scar from an injury during a fire alarm which *might* look like a hammer and sickle from some angles.

revoked because of his off duty political activities. Several of Beattie's skeptical co-workers retorted that they had participated with Beattie in some of his off duty political activities, and the government had not revoked their security clearances, so it appeared to them that the rumors must be based in truth. In other words, only Boeing's security clearance revocation, made under color of federal authority, gave the rumors legitimacy in their eyes.

Beattie replied that Boeing's Security Administrator told him that it was Beattie's "visibility which is what really creates a problem." App. at 256.

At times thereafter, Beattie was told by some Boeing firefighters that should he become trapped in a burning building, he should not expect to be rescued. Some

Boeing guards fingered their firearms and "stared him down" when Beattie neared them, with one once actually unsnapping his holster and grasping his sidearm. For the next several weeks Beattie had a legitimate fear of death or crippling injury at the hands of guards who might, even inadvertently, shoot him, or firefighters who might abandon him.

When Beattie would sit at the squad room lunch table to eat, everyone else would get up and leave. None of his co-workers would speak to Beattie, on or off duty, unless absolutely necessary. A cartoon drawing of Beattie shown with a hammer and sickle on his forehead was placed at the guard entrance to AF-1.

Beattie's employee locker at the Boeing fire station was filled with empty Seven-Up soda pop cans [this a reference

to convicted spy John Walker's method of placing empty 7-Up cans at pre-designated locations to communicate messages with his Soviet contacts]. Beattie was given the nickname "7-Up" and constantly monitored.

Beattie's supervisors told him he would never be promoted, nor allowed a transfer, assigned him to a Friday through Tuesday work schedule, and said he would never again see a weekend off. One supervisor told him he should quit Boeing.

Boeing's security and fire protection (S&FP) manager (Boeing's top security policy making individual), Kerry Crisp, made threats against Beattie and said to Boeing fire dept. captain Roy Tate, "I wish somebody would get rid of that Bob Beattie." Deposition of Roy Tate, May 24, 1990, pp. 36.

Acting on Beattie's grievance, the

union president met with Boeing's S&FP manager. They wrote a document settling the grievance, and this was signed by representatives of the union, Boeing, and by Beattie on or about March 3, 1989. Beattie v. U.S. 759 F.Supp. at 756 (A89-91). Boeing agreed in the document to request the AF to determine whether Beattie would again be allowed an AF-1 security clearance. Id. at 756(A89-91). Boeing said that from this time forward it was completely the decision of the AF. That being the case, the union president then told Beattie that this was the end of union involvement in this matter.[6]

Responding to the spy rumors, a representative of the Defense

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6. This exhausted Beattie's administrative remedy. Beattie later filed suit against the U.S. only after being completely Stonewalled by the Air Force, who refused to respond to either Beattie or his attorney. *see* Complaint, *Beattie v. U.S.*.

Investigative Service (DIS) met with Beattie on or about March 24, 1989. Beattie reported two contacts with Soviet citizens to the DIS. Beattie claims he had immediately reported these contacts to his Boeing supervisors, but was told not to make a written report as this would entail unnecessary paperwork. Beattie v. U.S. 759 F.Supp. at 758(A100-101).

On the DIS form, on or about March 24, 1989, Beattie made a hand-written report of these Soviet contacts. The district court characterized these contacts "as seemingly innocuous...." Beattie v. U.S. 759 F.Supp. at 762(A129).[7]

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7. One contact, wholly unanticipated, consisted of being introduced by mutual friend Michael McCally M.D. Ph.D. to visiting Soviet physician Dr. Simon Keshanivilli, Head of the Soviet Cancer Institute. The other was Beattie's telephoning the Soviet Embassy from the Boeing fire station, telling them, as president of FSR, that America's firefighters were sending their sympathy at the deaths of the firefighters of Chernobyl in the form of a plaque, and that Congressman Dan Glickman

The DIS investigated Beattie from March 1989 until June 1989, when their results were forwarded to DISCR for a decision. [cite omitted]. DISCR determined on July 30, 1989 that Beattie should maintain his security clearance, "based on the standard that it is clearly consistent with the national interest." Declaration of Leon J. Schachter, Acting Director, DISCR, November 30, 1989. *see* Beattie v. U.S. 759 F.Supp. at 757(A97-98).

On May 10, 1989 Boeing's S&FP manager wrote the AF asking them to make a decision on Beattie's AF-1 clearance, and tells the AF **not that this request was pursuant to a written settlement agreement with Beattie's union**, but that "This

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(now Secretary of Agriculture-Designate) would be delivering the plaque to their Embassy, which was done.

report was prompted by our learning of Mr. Beattie's making contact with representatives of designated countries and failing to report that contact." Beattie v. Boeing 43 F.3d at 561-562 (A11-12). Boeing does not send the AF a copy of Beattie's contact report, but only their own. App. at 317.

In making its security clearance determination, no one from the AF ever spoke with Beattie. Beattie v. U.S. 759 F.Supp. at 756-757(A93-94). In June 1989 the AF denied Beattie's security clearance access to AF-1 based on Beattie's "past history." Id. at 762(A127).

The court of appeals holds, as a matter of law, that the Boeing security administrator's decisions regarding security clearances "represent[s] the exercise of authority delegated by the

Executive Branch...." Beattie v. Boeing 43 F.3d at 566(A36). They quote Beattie v. United States, 759 F.Supp. at 762(A35):

> this court is not willing to compromise national security and substitute its decision for that of the Air Force on what is a security risk. To deny access on the basis of plaintiff's contacts with Soviet citizens is not so unreasonable or untenable as to justify a closer scrutiny, or judicial investigation of sorts, into the Air Force's reasoning.

"We agree with this sound reasoning and decide the current lawsuit on the same grounds. ... We see no compelling reason to treat the security clearance decision by Boeing differently than the similar decision made by the Air Force, and hence by the Executive Branch." Beattie v. Boeing 43 F.3d 559, 566 (A35-36).

However, Boeing's factual reasons for revoking Beattie's security clearance are wholly distinct from those of the AF.

Boeing represented both to the Executive and Judicial Branches that they did not know of Beattie's Soviet Union contacts until March 24, 1989, **more than six weeks after Boeing had already revoked Beattie's security clearance and during the time Beattie suffered significantly from harassment and mental distress.** The court finds that the Air Force revoked Beattie's clearance because of his Soviet Contacts--which Boeing could not have done by Feb. 11, not yet knowing of them until March 24--reports that Boeing revoked Beattie's clearance for this "off duty political activities," yet the court reaches their decision on the "same grounds." Beattie 43 F.3d at 566 (A35).

The entire focus of Beattie v. ***Boeing***, as opposed to the case of Beattie v. ***U.S.***, is on Beattie's harms suffered due

to *Boeing's unconstitutional actions*, well prior to any decisions by the AF or DIS.

By June 16, 1990 when Beattie resigned, a few of Beattie's co-workers had come to him and apologized for their earlier behavior, saying they now believed Beattie's initially claims were correct. Others still thought, and think, Beattie is a treasonous spy. Boeing's S&FP management continued to harass him,[8] pointedly passing him over for a promotion to lieutenant, which led to Beattie's

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8. Boeing's managers harassment of Beattie began after he became FSR president in 1986. In Feb. 1986 Beattie filed a grievance with his union concerning the behavior of fire dept. captain Roger Kucharek. Kucharek, while haranguing Beattie over his "anti nuclear" activities, ordered Beattie to perform an exhausting hose carrying drill three times without rest. When Beattie refused the fourth time, Kucharek gave Beattie the finger and made contemptuous remarks. Kucharek admitted to the latter behavior at the grievance meeting. *see* Minutes of Morning Meeting, UPGWA Local 255, March 4, 1986.

final grievance and his decision to quit.[9]

On June 16, 1990, a portion of Beattie's co-worker's held a going away party for him at the Boeing fire station. As Beattie was leaving, the Boeing S&FP emergency dispatcher toned the emergency klaxon and announced Beattie's "final alarm" over the radio. This is a firefighter salute traditionally given only out of the deepest respect.

The emergency dispatcher referred to *supra* was then demoted and transferred to the night shift by Boeing's S&FP manager, Kerry Crisp.[10]

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9. Beattie had two earned college degrees. The candidate Boeing promoted had no college and ten years less experience than Beattie, but did have an AF-1 clearance. Beattie's local union president refused to prosecute the grievance. After the union president later gave a deposition unfavorable to Beattie, he was promoted into Boeing S&FP management.

10. After his testimony that Kerry Crisp had threatened Beattie, Roy Tate was demoted from captain to lowest level

REASONS FOR GRANTING THE WRIT

THIS CASE OFFERS THE OPPORTUNITY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW IN BIVENS ACTIONS INVOLVING SECURITY CLEARANCE CASES WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Supreme Court has not specifically addressed whether the denial of a security clearance can be grounds for a *Bivens* action. Beattie v. Boeing 43 F.3d 559, 564(A28). This is an important federal question which should be settled by this Court. This case is directly on point. More particularly, in this case the Court may also address the status of private corporate persons under *Bivens* who are accused of Constitutional violations while exercising their judgment on behalf of the President. The questions presented are not resolved by the Court's opinions in Dept. of Navy v. Egan 484 U.S. 518

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firefighter. Kucharek was promoted to deputy chief.

(1988), Webster v. Doe 486 U.S. 592 (1988), or F.D.I.C. v. Meyer 114 S.Ct. 996 (1994). While three circuits have held that they may not review an executive branch decision to revoke a security clearance (Dorfmont v. Brown, 913 F.2d 1399, 1401 (9th Cir. 1990); Jamil v. Secretary, Dept. of Defense, 910 F.2d 1203, 1205-06 (4th Cir. 1990); Hill v. Dept. of Air Force, 844 F.2d 1407, 1409 (10th Cir. 1988)), in each case the denial was by a government body (DISCR, the CIA, and the U.S. Air Force), unlike this case, where the denial was by a private party, a corporate person (Boeing), over another private party (Beattie). Unlike other cases, in this case the Executive is not of one mind, with DISCR resolving that Beattie's having a security clearance is "clearly consistent with the national

interest," while three days earlier the AF decides he shouldn't have a security clearance because of his "past history."[11]

To decide the case in the absence of a Supreme Court decision on point, the Tenth Circuit discusses Dep't of Navy v. Egan 484 U.S. 518 (1988) and says of it in Beattie v. Boeing at 565(A30-31):

> *Egan* thus stands for the proposition that decisions regarding the grant or denial of a security clearance are the province of the Executive Branch. Although *Egan* addressed only the authority of the Merit Systems Protection Board to review such decisions, we believe that the reasoning extends to review by the courts.

The court of appeals here needlessly vastly expands the Supreme Court's narrow holding in *Egan*, and denies a coordinate

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11. Among the items in the Boeing security administrator's subpoenaed file on Beattie included a copy of the Sept.20, 1986 Wichita Eagle "Religion/Ethics" page, which featured an interview with Beattie about his peace activities. (A131-34).

branch of government, the entire federal judiciary of the tenth circuit, the right to decide what is constitutional in the realm of security clearance decisions.

The court of appeals concludes its opinion by saying:

> Beattie alleges that the denial of access violated his First Amendment rights. To consider this claim would necessarily require us to review the merits of the decisions to deny access to the Air Force One area. This we cannot do. The unreviewability of the security clearance decision is a "special factor counseling hesitation," which precludes our recognizing a *Bivens* claim in this case. Beattie v. Boeing 43 F.3d 559, 566 (10th Cir. 1994)(A37).

In *Bivens* the Supreme Court held that a cause of action existed for persons suffering violations of their constitutional rights arising from the actions of federal agents under color of authority. Beattie v. Boeing No. 91-1050-K MEMORANDUM AND ORDER D.Kan. (1992)

at 9 (A55). The court of appeals legal conclusion is that Boeing was acting as a federal agent under color of authority,[12] and the facts indicate that Boeing revoked Beattie's security clearance for his "off duty political activities," which Beattie alleges violates his First Amendment rights. The immediate and devastating damages to Beattie were directly consequent to Boeing's alleged unconstitutional conduct. Therefore, a valid and lawful *Bivens* claim is made.

SPECIAL FACTORS ANALYSIS

WHEN A PRIVATE PARTY IS MAKING SECURITY CLEARANCE DECISIONS OVER OTHER PRIVATE PARTIES, THIS SPECIAL FACTOR CALLS FOR JUDICIAL ATTENTION, NOT HESITATION

The Court wisely created the rule of

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12. Both the relatively unsophisticated Boeing employees and the relatively sophisticated appellate court judges thought that Beattie's security clearance revocation by Boeing was de facto and de jure by the government, and both, in their own way, gave the government its due deference.

"special factors counselling hesitation" in *Bivens* actions and have applied it to Executive Branch security clearance decisions with crystalline logic. However, as Holmes observed, "The life of the law has not been logic, but has been experience." Holmes, The Common Law at 1. The Court can *say*, as it did in *Egan*, that "to be denied clearance ... in no way implies disloyalty or any other repugnant characteristic," 484 U.S. at 528-29, but, as Lincoln observed, calling a tail a leg does not give a dog five legs. Whether Beattie's harms logically *should* have followed as a consequence of his security clearance revocation by Boeing, they did.

The special factor in this case is that the security clearance was revoked by a private party, with private interests of its own, which clearly will not always

coincide with the *People's*. There seems to be an inherent problem with the Executive giving such power to civilians over other civilians, but if the Executive is going to do so, the Court must be ready to fulfill its constitutional role balancing the Executive's power.

The Court must not so restrain itself that the courts may no longer carry their Constitutionally assigned duties. In this case an Article Three court has held that it is powerless to decide whether an Executive Branch official carrying out a Presidential function has violated a private citizen's First Amendment rights. I find no authority for such a decision in the text of the U.S. Constitution, which *does* say at Art.3, "The judicial power of the United States shall be vested in one Supreme Court and ...such...courts as the

Congress may ...establish." and that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution...--to controversies to which the United States shall be a party...."

In contrast to the monarchy they had so recently overthrown, and feared, the constitutional framers sought to disperse authority among three independent branches of government, equipping the leaders of each with the "necessary constitutional means and personal motives to resist encroachments of the others." James Madison, The Federalist No. 51, February 6, 1788. The point of the system, as Justice Brandeis later observed, was "not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. U.S., 272 U.S. 52, 293 (1926). While there should be considerable differences

of opinion as to whether a private citizen security administrator hired by, employed by, paid by, and supervised by a for-profit non-governmental transnational corporation (Boeing)(identified as a "private party" by the court of appeals) is *actually* acting in the best interests of the United States President in all its security clearance decisions, there should be no doubt but that "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137 (1803).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.... If there are any circumstances which permit an exception,

they do not now occur to us." West Virginia v. Barnette 319 U.S. 624, (1943). By default, the court of appeals has said that they have found circumstances which permit an exception to a petty official prescribing what shall be orthodox in politics. The court is also saying by default that Beattie has no First Amendment right to petition the government for a redress of grievances in the courts, although the court seems to be the proper place to go.

> Time and again, the Court has rebuked and rejected efforts to deprive people from their jobs in state and federal governments for their mere beliefs.... In our system, the courts have the ultimate responsibility of striking the balance between the state's right to protect itself...and the individual's right to protest, dissent and oppose. .... The courts are not instruments of the executive or legislative branches of the government. They are totally independent--subordinate only to the Constitution and to the rule of law. Abe Fortas, Concerning

Dissent, p. 47,49,50 (1970).

If the Supreme Court lets the court of appeals holdings stand in this case, then it is easy to see what security administrators in private companies in the Tenth Circuit will be able to do, immune from *Bivens* actions: They may revoke the security clearances of women who refuse to have sex with them. If pro-life, they may freely revoke the security clearances of those who are pro-choice. If pro-choice, they are free to revoke the security clearances of those who are pro-life. The company can intentionally dispose of a person with a disability, or one reaching great age, or a racial minority, or any member of a judicially or legislatively protected class with complete immunity from a *Bivens* suit. They don't even need to make up a pretext, because the courts

never reach the merits of the claims, so long as the revocation of a security clearance is an aspect of what they do. The Constitution will not be vindicated, and those puzzled persons who, as petitioner, are without other statutory or administrative remedy, will be without judicial means of redress.

> The First Congress, which included sixteen members of the Constitutional Convention and many more from state ratifying conventions, has been described as almost an adjourned session of the Convention. It was here that Congressman Alexander White ... argued that it would be better for the President, "to extend his power on some extraordinary occasion, even where he is not strictly justified by the constitution, than (that) the Legislature should grant him an improper power to be exercised at all times." ... "That this doctrine was accepted by every single one of our early statesmen," a careful scholar, Lucius Wilmerding, Jr., has written, "can easily be shown." Arthur M. Schlesinger, Jr., "What The Founding Fathers Intended," The Imperial Presidency, pp. 21(1973).

One may fairly substitute the word "Judiciary" for "Legislature" in the above quote. It was never the intent of the framers that the coordinate branches, the Legislature **or** the Judiciary, should grant by act or omission to the Executive such extraordinary unreviewable power over private citizens as the court of appeals has granted the President in this case.

In the cases where a private party is exercising its security clearance decision making power over other private parties under color of executive authority, so long as the courts have the means to cross examine witnesses under oath--often called "the bulwark of liberty"--they will be competent to fulfill their textual duty and review the merits of security clearance decisions allegedly made in violation of the Constitution.

CONCLUSION

For all the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

DATED March 1995.

Respectfully submitted,

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